Supreme Court, U.S.
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No. 06-1095

In The

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Petitioner,

v.

LEONARD BOLDEN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENT LEONARD BOLDEN

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QUESTIONS PRESENTED

Has the Petitioner failed to present a compelling reason for the Court to grant certiorari to review the Pennsylvania appellate courts' application of the *Lunsford* test to the facts of this case given that:

A. The Factual Record Supports the Pennsylvania Courts' Finding That the Locomotive Component in Question Was "Integral or Essential";

B. The Pennsylvania Courts' Finding Was Consistent With the Humanitarian Purpose and Broad Construction of the Boiler and Locomotive Inspection Acts (BIA/LIA); and

C. The Pennsylvania Courts' Finding Was Consistent With This Court's Holding in *Lunsford* and with the Post-*Lunsford* Decisional Law?

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COUNTER-STATEMENT OF THE CASE

This case involves career-ending injuries sustained at work on August 14, 1997 by Respondent Leonard Bolden on a SEPTA MU Locomotive. The MU Locomotive is an integrated locomotive and passenger vehicle. It is self-propelled, and is constructed with an engineer's section conjoined to the passenger area, akin to the front and back seats of an automobile.[1]

Mr. Bolden was injured by a malfunctioning vestibule door mechanism on the MU Locomotive. MU Locomotive doors like the one that injured Mr. Bolden are not new or experimental, but are found on most of Petitioner's regional rail lines.

The vestibule door is integral to the operation of the locomotive; both passengers and crew members use the door to enter and exit the locomotive. Mr. Bolden and fellow crew member Deidra Rich used the door to enter the locomotive on the day of the injury. The vestibule door also provides access to the engineer section through the passenger section.

The vestibule door serves the *safety function* of keeping passengers out of the vestibule while the train is moving. By closing automatically, the vestibule door also

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[1] As correctly stated by the trial court:

> *The operating compartment* was not joined to the *passenger section* by use of couplers or any other connecting device. Rather, the two *were permanently joined as a singular self-propelled unit* and therefore, a door from the passenger compartment was an appendage "belonging to" the operating compartment.

(Petition for Certiorari, Appendix 22a) (emphasis added).

serves the passenger comfort and safety functions of retaining heat and air conditioning.

Like the vestibule door, the "passenger area" of a MU Locomotive is used by both passengers and crew members. Conductors work everyday in the passenger section, collecting tickets and revenue and assisting passengers. The engineer sits in the passenger section while the train is preparing to leave. On the date of the accident, for example, Mr. Bolden's engineer, Mr. Fallis, sat in the passenger section of the MU Locomotive, awaiting the train's departure time.

The vestibule door consists of the door itself together with a pneumatic closing mechanism. A properly-functioning closing mechanism creates tension on the door requiring significant force to open the door.

At the time of Mr. Bolden's accident, the closing mechanism was defective. As a result, there was no tension at all on the door and when Mr. Bolden pushed the door to open it, he flew through the door and fell to the floor.

REASONS FOR DENYING THE WRIT

Petitioner seeks to persuade the Court that the *Lunsford* "integral or essential" test applies to the locomotive door mechanism at issue in this case, *in hopes that Petitioner will then be able to persuade the Court that the Pennsylvania appellate courts erroneously* ***applied*** *that test to the facts of this case*. This Court has made clear, however, that it does not wish to engage in the exercise of evaluating factual findings or in applying a rule of law to

those facts. Supreme Court Rule 10. For this reason, the Court should deny certiorari.

Even were the Court more predisposed to immerse itself in the factual findings of the courts below, certiorari would not be justified here because the factual record amply supports the Pennsylvania appellate courts' finding that the locomotive door and mechanism were "integral or essential" within the meaning of *Lunsford*.[2]

The Pennsylvania appellate courts' application of the "integral or essential" test was also consistent with the broad construction and humanitarian purpose of the BIA/LIA and with this Court's narrow holding in *Lunsford* not to impose strict liability under the Boiler Inspection Act (BIA) against a railroad seeking to promote safety through an experimental safety device.

The Pennsylvania appellate courts' decision also squares precisely with the well-established post-*Lunsford* case law, which distinguishes between *Failure-to-Maintain* cases (involving already-installed locomotive components) and *Failure-to-Install* cases (where a plaintiff argues that a certain device *should* be installed on a locomotive).

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[2] Throughout its plea to this Court, Petitioner employs hyperbolic language decrying the Pennsylvania Supreme Court's opinion as an "unprecedented" and "inexplicable departure from *Lunsford*" and "70 years of unbroken and uniform jurisprudence," in hopes that Petitioner can somehow persuade this Court of "the magnitude of the extraordinary error that occurred." (Petition 16, 20, 9). In fact, however, it is Petitioner that seeks this Court to engage in a marked departure from the history, purpose and language of the BIA/LIA, from this Court's decision in *Lunsford* and from the consistent body of case law that has followed the *Lunsford* decision.

I. Petitioner's Dissatisfaction With The Pennsylvania Courts' Application of *Lunsford* Does Not Warrant Certiorari

Petitioner devotes the great bulk of its Petition indicting the Pennsylvania appellate courts for not applying *Lunsford*'s "integral or essential" test.[3] What Petitioner overlooks is that the Pennsylvania appellate court decision *did* evaluate the locomotive component at issue against that test and found it to be "integral or essential" based upon the factual record:

> *The door to which the closing mechanism is attached is clearly "integral or essential," for without it there would be no access for crew or passengers to the locomotive car while the train is moving.* The closing mechanism itself serves only to enhance the safety and comfort of passengers and crew alike. Because the door is absolutely "integral or essential" and the closing mechanism makes the door safer to operate, *it should fall within the liberal construction of the LIA and its purpose of enhancing safety under the* ***Lunsford*** *test at any rate.*

(Petition, Appendix 9a) (emphasis added).

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[3] The last sections of the Petition reveal that Petitioner's ultimate hope here is that the Court will judicially legislate the "passenger sections" of MU locomotives out of the BIA/LIA. Petitioner also desires to limit the BIA/LIA to boilers and "unduly hazardous" components, or to parts that are "unique" to locomotives. The Petition's own recitation of the history of the BIA/LIA, however, makes clear that Petitioner's arguments fly in the face of Congress's intent to *expand* the BIA/LIA beyond boilers to cover the *entire* locomotive and all its parts, and to protect *passengers* and crew members alike. (Petition 9-12). Petitioner's proposed tests, which it draws from thin air, are unworthy of further comment.

That Petitioner is unhappy with how the Pennsylvania appellate courts applied the *Lunsford* "integral or essential" test should not justify certiorari. Supreme Court Rule 10.

A. The Factual Record Supports the Finding That The Locomotive Door and Closing Mechanism Were "Integral or Essential"

Even were the Court more predisposed to immerse itself in the factual findings of the courts below, certiorari would not be justified here because the factual record amply supports the Pennsylvania appellate courts' finding that the locomotive door and mechanism were "integral or essential" within the meaning of *Lunsford*.

The locomotive door at issue was used by both passengers and crew members to enter and exit the locomotive, and both Mr. Bolden and fellow crew members used the door to enter the locomotive on the day of the injury. The door also served the safety function of keeping passengers out of the vestibule while the train was moving. Finally, by closing automatically, the vestibule door served the passenger comfort and safety functions of retaining heat and air conditioning.

Fundamentally, of course, once installed, a *properly functioning* vestibule door was necessary to the *safe* functioning of the locomotive. That is, a defective door presents a safety hazard and could injure passengers and

crew, as it did here to Mr. Bolden.[4] Contrast this with *Lunsford* ("Respondent does not suggest that the Watchman, whether operative or not, detracted from safety or in any way contributed to the derailment").

B. The Pennsylvania Courts' "Integral or Essential" Finding Is Consistent With the Humanitarian Purpose and Broad Construction of the BIA/LIA

In finding the locomotive door and closing mechanism to be "integral or essential," the Pennsylvania appellate courts relied upon the "liberal construction of the LIA and its purpose of enhancing safety," recognizing that, "The prime purpose of the LIA is to enhance the safety of employees and passengers." (Petition, Appendix 9a, 7a).

Applying *Lunsford*'s "integral or essential" test liberally in light of the humanitarian purpose of the BIA/LIA harmonizes with this Court's own view of the Acts. *Urie v. Thompson*, 337 U.S. 163, 191-92 (1949) ("[W]e do not doubt that the prime purpose of the Boiler Inspection Act is the protection of railroad employees and perhaps also of passengers and the public at large from injury due to industrial accident"); *Lilly v. Grand Trunk Western Ry. Co.*, 317 U.S. 481, 486 (1943) (The [BIA], like the Safety Appliance Act, is to be liberally construed in light of its prime purpose, the protection of employees and others").

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[4] As stated in *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1246 (8th Cir. 1985), "once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it to be maintained in good repair at all times."

The Pennsylvania appellate courts' recognition of the humanitarian purpose and liberal construction of the BIA/LIA also accords with the decisions of the lower federal and state courts. *See Herold, supra*; *Whelan v. Penn Central Co.*, 503 F.2d 886, 890 (2nd Cir. 1974); *Palmer v. Union Pacific Railroad Co.*, 12 F.Supp.2d 588, 590 (S.D. Tex. 1998); *Southern Ry. Co. v. Bryan*, 375 F.2d 155, 158 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967); *Zollinger v. Pittsburgh and Lake Erie RR Co.*, 337 F.Supp. 913, 914 (W.D. Pa. 1972); *Fontaine v. National Railroad Passenger Corporation,* 63 Cal.Rptr.2d 644, 54 Cal.App.4th 1519, 1530 (Cal.App.3. Dist. 1997); *Missouri Pacific R. Co. v. Brown*, 862 S.W.2d 636, 638 (Tex.App. 1993); *Bankston v. Chesapeake & Ohio R. Co.*, 470 N.E.2d 512, 516 (Ill.App. 1 Dist. 1984); *Seaboard Coast Line Railroad Co. v. Jackson,* 256 So.2d 568, 570 (Fla.App. 1971), *cert. denied*, 409 U.S. 1001 (1972); *Duchsherer v. Northern Pacific Ry. Co.*, 4 Wash.App. 291, 294, 481 P.2d 929, 932 (1971); *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934, 936 (2nd Cir. 1948).

II. The Pennsylvania Courts' Decision Does Not Conflict With This Court's Holding in *Lunsford*

The Pennsylvania appellate courts refused to apply *Lunsford*'s "integral or essential" test to exclude from the BIA/LIA a non-experimental locomotive component already installed on a locomotive. This was entirely consistent with the precise holding of *Lunsford* as well as with this Court's concerns in reaching that decision.

Early in *Lunsford*, this Court *hinted* that it might hold broadly, stating that although the BIA had been much considered, "we have not heretofore undertaken to give

definite interpretation to the words 'parts and appurtenances.'" 297 U.S. at 401. Ultimately, however, the Court rendered a *narrow* holding: Relying on the BIA's goal of protecting railroad employees and passengers, the Court declined to impose BIA liability upon a railroad for trying to promote safety by experimenting with new safety devices. Stated otherwise, this Court, in construing a statute designed to promote safety, refused to *penalize* a railroad for seeking to develop new means to increase safety.

In *Lunsford*, an engineer was killed when his train struck a stone on the track and derailed. The locomotive was equipped with a "Wright's Little Watchman," which was intended to apply the brakes in cases of derailment. As this Court emphasized in its opinion, the Watchman device was "not in common use," and, because it was experimental, was not at a point where it could be relied upon.

Relying on the policy goal of promoting safety, this Court declined to impose BIA liability in respect of an experimental safety device whose ultimate goal was to increase safety:

> [I]t cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for *experimental* purposes, should become part thereof within the rule of absolute liability. *So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose – avoidance of unnecessary peril to life or limb.* Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But *mere experimental* devices *which do not increase the*

> *peril*, but may prove helpful in the emergency, are not.

297 U.S. at 402 (emphasis added).

III. The Pennsylvania Decision Aligns Squarely With The Post-*Lunsford* Distinction Between *Failure-To-Maintain* and *Failure-to-Install* Cases

In the seventy years since *Lunsford,* the state and federal courts have developed a consistent body of law that distinguishes between: (a) *Failure-to-Maintain* cases, where, as here, a person is injured by a component already installed on a locomotive; and (b) *Failure-to-Install* cases, where a plaintiff claims that a certain piece of equipment should have been installed on a locomotive.

In *Failure-to-Install* cases, the courts hold that under *Lunsford,* a carrier is not liable under the BIA/LIA for failing to install equipment unless the equipment is required by federal regulation, or is considered to be an "integral or essential" part of a locomotive. *Reed v. Norfolk Southern Ry. Co.*, 312 F.Supp.2d 924, 927 (N.D. Ohio, 2004), *citing Mosco Baltimore & Ohio Railroad*, 817 F.2d 1088, 1091 (4th Cir.), *cert. denied*, 484 U.S. 851 (1987); *King v. Southern Pacific Transp. Co.,* 855 F.2d 1485, 1488-89 (10th Cir. 1988).

In *Failure-to-Install* cases, the courts have universally applied *Lunsford*'s "integral or essential" test to exclude uninstalled hypothetical components from the ambit of the BIA/LIA. *Gardner v. CSX Transportation*, 201 W.Va. 490, 498 S.E.2d 473 (1997) (failure to install seatbelts and armrests on locomotive seats), *citing Mosco, supra* (failure to install screens, bars or grates on locomotive windows);

King v. Southern Pacific Transp. Co., supra, 855 F.2d at 1488-89 (failure to install armrest on locomotive seat); *McGinn v. Burlington Northern Railroad Co.*, 102 F.3d 295 (7th Cir. 1996) (failure to install luggage racks).

On the other hand, no case has been found in which a court used the *Lunsford* "integral or essential" test to exclude from the ambit of the BIA/LIA an already-installed locomotive component in a *Failure-to-Maintain* case.

As stated in *King v. Southern Pacific Transporation Co.*:

> "[*F*]*ailure to maintain" claims have been widely recognized as meritorious. However, those claims are entirely different from claims that a railroad is liable for failing to install additional safety devices* which the Secretary of Transportation has not seen fit to require . . . Such *"failure to install" claims have been rejected.*

855 F.2d at 1489 (emphasis added and in original). *See also Gardner v. CSX Transportation, supra*, 498 S.E.2d at 480.

Consistently, in every one of the *Failure-to-Maintain* cases cited by Petitioner, the courts found the installed component to be encompassed by the BIA/LIA. (Petition 15-18, notes 4, 5). In most of these cases, the courts did *not* hold the device at issue to be "integral or essential." *Herold v. Burlington Northern, supra*; *Green v. River Terminal Railway Co.*, 585 F.Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1987); *Spade v. CSX Transp., Inc.*, 2004 WL 2980740 (W.D. Mich. 2004); *Seaboard*

Coastline Railroad Co. v. Jackson, 256 So.2d 568 (Fla.App. 1971), *cert. denied,* 409 U.S. 1001 (1972).[5] In both *Seaboard Coastline Railroad* and *Green v. River Terminal*, the railroad had argued that the radios were not "integral or essential" to the engine's movement, but the courts found the radios to be "parts or appurtenances" nonetheless.

Although some *Failure-to-Maintain* decisions mention *Lunsford*'s "integral or essential" language, the courts in these cases generally reach their holdings by broadly construing the "parts and appurtenances" language found in the texts of the BIA and LIA, consistent with the Acts' humanitarian purpose of promoting passenger and crew member safety. The courts distinguish *Lunsford* on the grounds that it dealt with an experimental device. *See Herold v. Burlington Northern, Inc., supra*; *Green v. River Terminal, supra*; *Seaboard Coast Line Railroad Co. v. Jackson, supra*; *Duchsherer v. Northern Pacific Railway Co., supra.*

Consistently, in the instant case, the Pennsylvania appellate courts properly recognized that *Lunsford*'s "integral or essential" test removes from the ambit of the BIA/LIA those cases "where experimental devices are used or carriers have failed to install required equipment," unlike the case at bar which, "deals with a failure to maintain equipment that is useful and increases safety on a locomotive car." (Petition, Appendix 6a-7a).

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[5] In only two of the cases did the Court state explicitly that the component at issue was integral or essential. *Zolinger v. Pittsburg and Lake Erie R.R.*, 38 F.Supp. 913, 914 (W.D. Pa. 1972) (push-pole); *Hubbard v. National Railroad Passenger Corp.*, 2004 WL 1977646 (Mich.App. 2004) (engineer's seat).

CONCLUSION

For the foregoing reasons, Respondent Leonard Bolden respectfully requests the Court to deny the petition for certiorari to the Pennsylvania Supreme Court.

Respectfully submitted,

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